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Before the
Federal Communications Commission
 Washington, D.C. 20554

CTIA
 STAMP & RETURN

In the Matter of)
)
 Cellular Telecommunications Industry Association's)
 Petition for Rule Making Concerning the Broadband)
 PCS Entrepreneurs' Block Rules)

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 COMMUNICATIONS DIVISION

To: The Commission

**PETITION FOR RULE MAKING OF
 THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Cellular Telecommunications Industry Association ("CTIA")¹ hereby submits a Petition for Rule Making regarding the Commission's rules governing C and F Block broadband PCS licenses (the "Entrepreneurs' Block rules"). Section 11 of the Communications Act commands the Commission to review its regulations "in every even-numbered year" and "repeal or modify any regulation it determines is no longer necessary in the public interest."² CTIA had intended to urge the Commission to reexamine its CMRS eligibility rules, including the Entrepreneurs' Block rules, in the context of the Commission's 2000 Biennial Review, which is scheduled to begin later this year. Recently, however, SBC Communications, Inc. and Nextel Communications, Inc. filed petitions that seek modification and/or waiver of certain eligibility and bidding rules in connection

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 49 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

² 47 U.S.C. 161.

with the reauction of certain Entrepreneur's Block licenses. In response to these two petitions, the Commission has instituted a proceeding to consider the specific issues raised in the petitions.³ While CTIA will file separate comments addressing Nextel's proposal to modify the structure of the auction rules, CTIA believes the Commission should examine -- in their entirety -- the eligibility rules governing broadband PCS licenses held by so-called "Designated Entities" (or "DEs"). Because the Commission's DE eligibility policies and regulations are so tightly intertwined, it is inappropriate to look at them in a vacuum. Put simply, a change in one part of the eligibility rules would implicate others. Therefore, the Commission should institute an expedited rule making to reexamine all of its rules related to the broadband PCS Entrepreneurs' Block program. CTIA supports such a review, on an expedited basis, to permit the reauction to proceed not just on time, but in a manner that is fair to all interested parties.

I. Background

The 1993 legislation authorizing use of competitive bidding to award spectrum licenses explicitly stated the objectives the Commission was to promote in designing its spectrum auction program. These objectives include:

the development and rapid deployment of new technologies, products and services for the benefit of the public; promoting economic opportunity and competition and ensuring that new and innovative technologies are readily

³ See *Wireless Telecommunications Bureau Seeks Comment on SBC Communications, Inc.'s Request for Waiver of the Eligibility Requirements for Participation in the Upcoming PCS C and F Block Auction*, Public Notice, DA 00-145 (rel. January 31, 2000); *Wireless Telecommunications Bureau Seeks Comment On Nextel Communications, Inc. Petition Regarding PCS C and F Block Spectrum*, Public Notice, DA 00-191 (rel. February 3, 2000); and *Extension of Filing Deadline For Comments to the Petitions Filed by SBC Communications, Inc. and Nextel Communications, Inc. Regarding PCS C and F Block Rules*, Public Notice, DA 00-271 (rel. February 11, 2000) (collectively referred to herein as the "Eligibility Public Notices").

accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; and

efficient and intensive use of the electromagnetic spectrum.⁴

Shortly after enactment of the 1993 Act, the Commission promulgated service and competitive bidding rules for broadband PCS. In so doing, it faced the difficult task of advancing each of the potentially competing objectives Congress had identified. The Commission adopted rules that entitled a Designated Entity to take advantage of low-interest installment financing and bidding credits. Moreover, with respect to two of the six broadband PCS blocks, the Commission restricted eligibility to only entities below a certain size. The Commission's task was made even harder following the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097 (1995), which obligated the Commission to revise the DE eligibility requirements to qualifying entities below a certain size.

The history of the Entrepreneurs' Block licenses is mixed, at best. While some DEs have followed the rules, made timely installment payments to the government, and are providing competitive wireless services to the public, many of the Entrepreneurs' Block licenses have been tied up in bankruptcy litigation. Indeed, Chairman Kennard stated recently, "[t]his spectrum has laid fallow for too long."⁵ Moreover, the Commission has suspended the use of installment payments

⁴ The Omnibus Budget Reconciliation Act of 1993 (the "1993 Act"), codified at 47 U.S.C. § 309(j)(3)(B).

⁵ See News Release, *FCC Informs Court That NextWave Licenses Have Canceled and Sets Date for Auction*, (released January 12, 2000).

in its subsequent auctions.⁶ It is fair to say that the Entrepreneurs' Block rules have not worked entirely as envisioned.

II. The Entrepreneurs' Block Rules Should Be Broadly Reexamined

CTIA fully appreciates the laudable goals the Commission has sought to advance through the Entrepreneurs' Block rules. The history of the Entrepreneurs' Block, however, suggests the need to determine through a comprehensive review whether the Commission's rules continue to serve the purposes for which they were adopted, or whether changes should be made. This is especially important in light of the proceeding the Commission has instituted by the *Eligibility Public Notices* and the related requests for waiver of the CMRS spectrum cap that are the subject of a separate proceeding.⁷

As noted above, numerous parties have lived by these rules, and CTIA urges the Commission to ensure that no injustice is done to these licensees in any reexamination of the Entrepreneurs' Block rules.⁸ The Commission must not ignore the incumbent DE's who have met all of their obligations. Fairness to these small entity incumbents strongly supports the comprehensive rule making CTIA is requesting.

⁶ See *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures*, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997), at ¶ 40 ("[W]e conclude that until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses.")

⁷ See *Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corporation and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits*, Public Notice, DA 00-318 (rel. February 18, 2000).

⁸ For example, if as a result of this proceeding the five-year transfer restriction were to be eliminated or modified, the change should also apply to existing Entrepreneurs' Block licensees.

III. The Entrepreneurs' Block Rules

In support of its Petition, CTIA provides the following summary of the major Entrepreneurs' Block rules it is asking the Commission to reexamine, along with a brief description of the reasons why Commission review is warranted:

General Rule on Eligibility for C and F Block (47 C.F.R. § 24.709(a)(1) and (2))

The Commission has determined C and F block licenses may only be awarded to applicants who, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues under \$125 million and total assets under \$500 million. These thresholds, working together with the control and affiliation rules discussed below, were designed to ensure that new entrants would be afforded an opportunity to provide broadband PCS. Experience has shown that few new entrants have successfully entered the marketplace, and that the CMRS industry is a capital-intensive business. The proceeding should examine whether these thresholds are still appropriate.

Control Exceptions to General Rule on Eligibility (47 C.F.R. §§ 24.709(b)(3)-(6))

A complex set of exceptions were included in the C and F Block eligibility rules in an attempt to ensure that each designated entity controls its business while enabling it to attract sufficient investment capital to allow it to satisfy its installment obligations, construct its network, and compete with its much larger competitors. While these exceptions have succeeded in permitting designated entities to offer equity positions of as much as 49.9 percent to large, multinational corporations, thereby creating strong bidding entities that dominated the first Entrepreneurs' Block auction, in some cases investors have been unwilling to sufficiently capitalize a designated entity without the ability to exercise control. Though the Commission has modified the control requirements for certain DEs for later auctions (*see* 47 C.F.R. § 1.2110(b)), it is worth considering whether the C and F Block rules have been faithful to the spirit of the 1993 Act, have had the effect intended by the Commission, and have truly advanced the objectives for competitive bidding set forth in the 1993 Act.

Affiliation Rules (47 C.F.R. §§ 1.2110(b)(4) and 24.720(l))

While wishing to encourage sufficient investment in DEs, the Commission also wanted to ensure that bidders on Entrepreneurs' Block licenses indeed qualified as "entrepreneurs." As noted above, the eligibility rules require aggregation of the revenues and assets of the applicant, its affiliates and persons or entities that hold interests in the applicant and their affiliates. Affiliation can arise through a number

of factors (stock ownership amounting to control, spousal or kinship relationships, common management or facilities, joint ventures, etc.). An exclusion from affiliation coverage was adopted for certain Indian tribes and Alaska Native entities (*see* 47 C.F.R. §§ 1.2110(b)(4)(xi) and 24.720(l)(11)) that has permitted such entities to hold auctioned licenses even though they would otherwise exceed the eligibility thresholds. It would be worthwhile for the Commission to study whether the affiliation rules have produced the desired results, or whether any changes are warranted.

Full Dilution of Certain Interests (47 C.F.R. § 24.709(b)(7))

In calculating ownership interests in designated entities for eligibility purposes, interests such as warrants, stock options and convertible debentures are treated as if the rights thereunder have been fully exercised. This rule dampens the interest of some potential investors who, though the rules prohibit them from exercising control for a period of time, might otherwise be willing to invest if they had the prospect for future control. This rule should be reexamined to determine whether changes might better advance the statutory objectives.

Transfer Restriction (47 C.F.R. §§ 24.839(a) and 24.709(a)(3))

Designated entities may not transfer control over or assign Entrepreneurs' Block licenses to non-DEs until at least five years from the date of initial license grant. Given the difficulty that many designated entities have encountered in financing installment obligations and network build-out, and especially given the fact that the Commission is considering allowing non-DEs to participate in the upcoming reauction of C and F Block licenses, the transfer restriction should be reexamined to ensure fair treatment for all C and F Block licensees.

Bidding Credits for C and F Block Licenses (47 C.F.R. §§ 24.712 and 24.717)

The rules allow designated entities to use bidding credits to lower the cost of their winning bids. Bidders eligible for bidding credits have competed with other bidders who were not eligible for credits. Now that the Commission has held numerous auctions in which bidding credits were made available, it should explore whether this benefit has produced the intended result for small businesses.

Installment Payment Rules (47 C.F.R. §§ 1.2110(f), 24.711(b) and 24.716(b))

Entrepreneurs' Block licensees have been permitted to make payments on their winning bids in installments. Below-market interest rates tied to the rate for ten-year Treasury obligations applicable on the date of licensing were offered, with provisions for interest-only payments for some period of years (up to six years), depending on the characteristics of the licensee. Some have claimed that the availability of these

favorable financing terms contributed to the high bids submitted in the first C Block auction. As noted above, the Commission has indicated that it would not employ installment financing until further notice. Prospective bidders deserve to know whether and under what circumstances the Commission might resume installment financing.

Unjust Enrichment Rules (47 C.F.R. §§ 1.2111, 24.712(c) and 24.717(c))

Under the current rules, a DE licensee proposing to assign or transfer control of its license to an entity not meeting the eligibility criteria (assuming such a transfer or assignment is permitted) must make an unjust enrichment payment. This ensures that the special provisions designed to benefit DEs do not ultimately benefit entities for whom they were not intended. It is important to examine whether these rules have worked to achieve their goal, especially given the fact that the Commission is considering allowing non-DEs to participate in the upcoming reauction of C and F Block licenses.

Partitioning Rules (47 C.F.R. §§ 1.2110(d) and 24.714(a)(3))

The Commission has adopted rules that permit CMRS licensees to partition service areas and disaggregate spectrum. Entrepreneurs' Block licensees may partition to other similarly qualified entrepreneurs at any time following the issuance of their licenses. They may not, however, partition to non-entrepreneurs during the first five years of their license term. After the first five years, partitioning to non-entrepreneurs is permitted, provided that the partitioner make an unjust enrichment payment. If the eligibility rules for holding Entrepreneurs' Block licenses acquired in the July 2000 reauction are changed, it would seem appropriate to reevaluate the rules affecting the ability of other Entrepreneurs' Block licensees to partition their service areas.

Small Business Definitions (47 C.F.R. § 1.2110(b)(1))

The Commission establishes the definition of "small business" on a service-specific basis. The Commission is thereby able to take into account the particular capital requirements for firms as they prepare to enter different markets, resulting in different small business size standards being adopted for different auctions. For the Entrepreneurs' Blocks, however, the same size standards as those applied in the auctions continue to govern eligibility for assignment or transfer of control of licenses. As the market demand for wireless services grows and new service offerings develop, the Commission should study the Entrepreneurs' Block size standards to determine whether they continue to be appropriate.

Publicly Traded Corporation Exception (47 C.F.R. § 24.709(b)(2))

The Commission has provided an exception to the Entrepreneurs' Block eligibility rules for publicly traded corporations with widely dispersed voting power. See 47 C.F.R. § 24.720(m). The gross revenues and total assets of persons or entities that hold an interest in such an applicant, and their affiliates, are not considered. This exception may have allowed entities not intended to be benefited to acquire Entrepreneurs' Block licenses, or alternatively, this exception may have benefited build-out and competition. In a rule making proceeding, the Commission could study the effect of this rule.

CMRS Spectrum Cap (47 C.F.R. § 20.6)

Consideration of eligibility issues for the reauction of the C and F Block licenses necessarily requires reevaluation of the applicability of the CMRS spectrum cap, 47 C.F.R. § 20.6. AT&T Wireless Services, Inc., Bell Atlantic Mobile, Inc. and BellSouth Corporation have filed petitions seeking relief from the CMRS spectrum cap so as to permit non-designated entities to participate in the upcoming Entrepreneurs' Block reauction without regard to the spectrum cap.⁹ In addition, CTIA and two of its members previously filed petitions seeking reconsideration of the Commission's Order reexamining the CMRS spectrum cap and denying CTIA's request for forbearance.¹⁰

The sustained growth of the wireless industry, and the expansion of CMRS service offerings to include next generation advanced services, clearly demonstrate that application of the CMRS

⁹ See *AT&T Wireless Services, Inc.'s Petition for Waiver and Expedited Action*, (filed February 15, 2000), *Bell Atlantic Mobile, Inc.'s Petition for Limited Forbearance* (filed February 17, 2000), and *BellSouth Corporation Petition for Waiver and Expedited Action* (filed February 17, 2000). BellSouth's petition also requests a waiver of the Entrepreneurs' Block eligibility requirements to permit it to participate in the July 26, 2000 reauction. As noted above, the Commission has issued a *Public Notice* soliciting comment on these petitions. See n.7, *supra*.

¹⁰ See *Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 23878 (rel. February 8, 2000). Notice of the petitions was recently published in the *Federal Register*. See 65 Fed. Reg. 7873 (February 16, 2000). Comments on the petitions are due to be filed by March 2, 2000.

spectrum cap impedes the realization of Congress's objective to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."¹¹ The question raised in each set of petitions is whether the Commission should permit incumbent licensees to acquire additional licenses heretofore unavailable to them under current rules.

IV. Conclusion

CTIA respectfully submits that the public interest requires that the Commission conduct a comprehensive reexamination of its Entrepreneurs' Block rules. With the Commission planning to license a significant amount of CMRS spectrum within the next few months, it is important that the DE eligibility rules be addressed in a unified manner. Only a broad inquiry can hope to balance the sometimes competing goals of diversity in licensing along with the rapid deployment of services and

¹¹ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., at 1 (1996).

efficient and productive use of the spectrum. CTIA therefore urges the Commission to institute a comprehensive rule making to reexamine its rules related to the broadband PCS Entrepreneurs' Block program.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
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